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SUPREME COURT, U. S.
FILED
MAR 21 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 979

11,000 ACRES OF LAND, MORE OR LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT NO. E-419,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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WARLICK LAW PRINTING CO., INC.—Law Brief Printing—Dallas, Texas—Central-4091

CONTENTS

	Page
Table of Authorities	ii
Caption	1
Opinions of the Courts Below	1
Jurisdiction	1
Statement	2
Specification of Errors	2
Summary of the Argument	3
Point A Restated for Argument	4
Argument under Point A	4–14
Point B Restated for Argument	15
Argument under Point B	15–24
Point C Restated for Argument	25
Argument under Point C	25–30
Conclusion	30
Appendix	31–34

Page

D

Danforth v. United States, 308 U. S. 271, 84 L. Ed. 240 ..... 7, 11

Declaration of Taking Act (46 Stat. 1421-1422, c. 307, 40 U. S. C., Secs. 258a-258e) 5, 6, 7, 8, 13

E

Eagle Lake Improvement Co. v. United States, 141 Fed. (2d) 562 16

Eastman Kodak Co. v. Southern Photo Co., 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684 24

H

Hager v. Stakes, 116 Tex. 453, 294 S. W. 835 15

Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S. W. 296 15

S

Sheffield v. Hogg, 124 Tex. 290, 77 S. W. (2d) 1021 15

Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290 15

T

Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717 15

Thuss on Texas Oil & Gas, Second Edition, Sec. 29, Page 108 17

U

United States v. Miller, 317 U. S. 369, 87 L. Ed. 336 7, 21

United States v. 150.29 Acres of Land, 135 Fed. (2d) 878 9

United States v. 576.734 Acres of Land, 143 Fed. (2d) 408 10

Page

U

(Continued)

United States v. Bennett, 53 Fed. Sup. 670 11

United States v. General Motors Corporation, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 379, 156 A. L. R. 390 ..... 19, 21

United States v. 9.94 Acres of Land, 51 Fed. Sup. 478 28

United States v. 60,000 Square Feet of Land, 53 Fed. Sup. 764 28

United States v. Bauman, 56 Fed. Sup. 109 28

W

W. T. Waggoner Estate v. Wichita County, 3 Fed. (2d) 962 16

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I.
THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case is reported in Vol. 152, Pages 566-570 of the Federal Reporter, Second Series.

No opinion was delivered in the District Court.

II.
JURISDICTION

The jurisdiction of this court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938; U. S. C. 28, Sec. 347.

III.

STATEMENT

The essential facts of the case are fully stated in the petition for Writ of Certiorari filed by the petitioners in this cause, to which reference is here made. In the interest of brevity same are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the value of the property condemned was properly determined as of the date possession was taken by the Government;

2. The Circuit Court of Appeals erred in limiting the compensation awarded the land owners by virtue of the condemnation to the annual rental value of the surface only;

3. The Circuit Court of Appeals erred in refusing to allow the land owners to recover compensation for damages sustained to the oil and gas rights in the land condemned;

4. The Circuit Court of Appeals erred in holding that the compensation to which the owner of the oil lease affecting the condemned land is entitled must be determined in separate hearings for each year the land is taken.

V.

SUMMARY OF THE ARGUMENT

POINT A.

The procedure prescribed in the Declaration of Taking Act of February 26, 1931, having been followed by the Government in this cause, the value of the property affected by the condemnation for the purpose of fixing compensation should be determined as of the date the Declaration of Taking was filed, which under the provisions of said Act is the "date of taking."

POINT B.

The land involved herein having been condemned by the Government for a term of years extendable indefinitely at its option, the compensation awarded the land owners should not be limited to the annual rental value of the surface only, but same should also comprehend the depreciation in market value of the land and the oil and gas rights therein resulting from the exclusive taking by the Government.

POINT C.

The damages sustained by the owner of the oil and gas lease affecting the land condemned should be ascertained and awarded fully and finally in one proceeding and judgment and not in deferred installments pursuant to a series of separate hearings and orders based on each year's occupancy of the land by the Government.

VI.

ARGUMENT

POINT A.

The procedure prescribed in the Declaration of Taking Act of February 26, 1931, having been followed by the Government in this cause, the value of the property affected by the condemnation for the purpose of fixing compensation should be determined as of the date the Declaration of Taking was filed, which under the provisions of said Act is the "date of taking."

One of the important questions presented herein, and one which we submit has not been settled heretofore by the Supreme Court, is whether or not the correct date to evaluate property condemned by the Government in cases when the procedure prescribed by the Declaration of Taking Act is followed, is the date when actual possession of the land was taken, or the date when the declaration of taking was filed. In the instant case, the trial court found that the Government entered into possession of the land involved herein on April 1, 1943. The date the declaration of taking was filed respecting said land was November 19, 1943. Counsel for the Government insists that all evidence relating to values should be confined to the former date, April 1, 1943; whereas, petitioners urge that the correct date to which such values should be related is the date the declaration of taking was filed, on November 19, 1943. The Circuit Court of Appeals sustained the position of the Government on this question. (R. 141.)

By Act of Congress of February 26, 1931, known as the Declaration of Taking Act (46 Stat. 1421-1422, c. 307, 40 U. S. C., Secs. 258a-258e, quoted in Appendix), the procedure to be followed in condemnation of property for Federal projects was amended and amplified in certain particulars, the principal purpose of which was to permit the taking of property by condemnation in advance of final judgment. Theretofore it had been a prerequisite to the vesting of title that final judgment must be entered. However, by virtue of the aforesaid Act of February 26, 1931, a Federal agency is empowered to cause the title to land to vest in the Government in a condemnation proceeding before final judgment by the process of filing what is denominated a "declaration of taking" and depositing with the Clerk of the Court a sum of money representing the estimated just compensation of the land taken.

It is to be recognized that by virtue of the Second War Powers Act, the Secretary of War, or the Secretary of Navy, or other Federal agency authorized by the President, is empowered to take immediate possession of property upon or after the filing of the condemnation petition, notwithstanding any other law. Said statute further stipulates that such property may be thus used and occupied even prior to the approval of title by the Attorney General, as otherwise required by statute. The evident purpose of such legislation was to authorize the military authorities of the Government to go into immediate possession and occupancy of lands desired for military purpose, even in advance of the filing of a declaration of taking; but there is nothing in such statute to indicate that the provisions

of the law relating to the filing of declarations of taking and deposit of estimated compensation were in any wise dispensed with.

The conclusion is borne out by the very fact that in the instant case the Government actually followed proceedings contained in the Declaration of Taking Act by filing declarations of taking and making the estimated deposits of compensation in the office of the Clerk of the Court, and otherwise complying with the provisions of said statute. Substantiation of this statement is further found in the judgment which was entered by the court below on the declaration of taking which was filed herein. (R. 60-65.)

Counsel for the Government takes the position that the Government was not obligated to file a declaration of taking in this case, but that it could have proceeded otherwise to effect condemnation. Be that as it may, it conclusively appears that in the instant case the Government did elect to follow the procedure prescribed in *Section 258a, Title 40*, by filing a declaration of taking and making deposit in court, as therein required. Consequently, inasmuch as the Government chose to follow the procedure prescribed in said statute, it necessarily has become bound by the terms of the provisions thereof and the rights of all parties should be determined in accordance therewith. It is, therefore, wholly beside the point to consider what might have been the legal effect upon the rights of the parties if some other course of procedure had been undertaken.

Generally speaking, unless otherwise provided by special statute, the rule of law seems to be well settled that in condemnation proceedings the value of the property condemned

shall be fixed and determined as of the time of the taking. This rule was reannounced in a recent case by the Supreme Court of the United States in *United States v. Miller*, 317 U. S. 369, 87 L. Ed. 336, in an opinion by Justice Roberts, in which it is stated:

> "Respondents correctly say that value is to be ascertained as of the date of the taking."

Likewise, in *Danforth v. United States*, 308 U. S. 271, 84 L. Ed. 240, it is said:

> "Just compensation is valued at the time of the taking. The Congress in other situations has adopted the time of taking as the date for determination of value."

The last sentence in the above quotation is peculiarly significant upon the question under discussion. This is for the reason that the "other situations" mentioned in the opinion wherein Congress has fixed the time of taking as the date for determining value, has specific reference to *Section 258a, Title 40*, as is disclosed by the footnote appended to the Court's opinion. In other words, it conclusively appears from the foregoing that the Supreme Court has expressly construed the provisions of *Section 258a, Title 40*, to mean that the date of taking as therein fixed is the appropriate time to determine the value of the property taken.

This being true, it is now only necessary to examine the phraseology of the statute itself (Appendix), for the purpose of ascertaining the time thereby fixed as the date of taking. A mere reading of the statute, in our opinion, clearly establishes that the date of taking is the date when

the declaration of taking is filed and the deposit of estimated compensation is made in court. We take the liberty of quoting in condensed form that portion of *Section 258a* which has direct bearing on the question under discussion, as follows:

> "Upon the filing of said declaration of taking and of the deposit in court * * * title to said land * * * shall vest in the United States of America and said lands *shall be deemed to be condemned and taken* for the use of the United States and the right to just compensation for same shall vest in the persons entitled thereto." (Emphasis ours.)

In accordance with the provisions of the foregoing statute, the immediate effects of the filing of declaration of taking and of the deposit in court are three-fold, to-wit: (1) The title to the land sought to be condemned then vests in the United States; (2) said land shall then be deemed to have been condemned and taken for the United States; and, (3) right to compensation for the land taken shall vest in the owners of same. Thus it is provided in express language that not until a declaration of taking has been filed and a deposit made in court shall land sought to be condemned be deemed to have been *taken*. We therefore submit that this language of the statute itself conclusively determines the issue now under consideration, because by express statutory provision the exact time of taking is fixed as the date the declaration of taking is filed.

We are not without judicial authority in support of the aforesaid construction which we have placed upon the pro-

visions of the statute under consideration. First we refer to the case of *United States v. 150.29 Acres of Land, more or less, in Milwaukee County, Wisconsin, reported in* 135 Fed. (2d) 878. The decision in this case was rendered by the Circuit Court of Appeals for the Seventh Circuit on May 19, 1943. Here, as in the instant case, petition for condemnation was filed by the Government and order for immediate possession was entered by the court on the same date, to-wit, April 20, 1942. However, declaration of taking was not filed until November 10, 1942. It appears, however, that the Government actually entered into possession of the land on April 30, 1942, about ten days after the petition in condemnation was filed. The issue in the case was whether or not the land was subject to state taxes which were assessed on May 1, 1942, which was after the Government went into possession of the premises but before the declaration of taking was filed. According to the opinion of the court the following question was posed for determination: "The question arises, when did the United States take the land in question?" The court's answer to this question is reflected in the following language of the opinion:

> "As to the first question, we think the property in this case was taken as of November 10, 1942 (the date the declaration of taking was filed.) The statute seems to us clear on that point (reference is here made in footnote to Section 258a, Title 40). When the declaration of taking was filed in the condemnation proceedings and the compensation agreed upon was paid into

the court, the title sought to be taken vested in the United States and the interest of the United States sought became the property of the United States.

"* * * Here * * * the United States did file a declaration of taking and paid the stipulated fair cash market value of the property into court. Up until that time, the condemnor might have discontinued and abandoned its efforts. Danforth v. United States, 308 U. S. 271, 284, 60 S. Ct. 231, 84 L. Ed. 240. Under such circumstances we think that the taking was as of November 10, 1942, when the declaration of taking was filed and the money paid into the court."

In *The United States v. 576.734 Acres of Land, in Mongomery County, Pa.*, 143 Fed. (2d) 408 (decided by the Circuit Court of Appeals for the Third Circuit), the Government condemned a farm which was under lease. The question involved in the appeal was the extent of the award to which the lessee was entitled. The court expressly held that such valuation should be assessed as of date the declaration of taking was filed in said cause, to-wit, March 23, 1942. In this connection the court said:

"The basic question to be determined was the value of the tenant's lease. The chief item in that value was the worth of the growing crop on March 23, 1942. The evidence concerning the nature of this piece of land, plus the history of growing crops in the neighborhood for the season was only relevant insofar as it gave a basis for determining the value of that crop on March 23."

The question under discussion was also decided in the opinion of the recent case of *The United States v. Bennett*, 53 Fed. Sup. 670, rendered by Judge Lewis B. Schwellenbach, (now Secretary of Labor). In that case the declaration of taking was filed on November 16, 1942, and contemporaneously therewith the Government made a deposit in court as estimated damages. Here there was a controversy concerning who should be entitled to the compensation to be awarded, and in order to decide the same the ownership on the date of fixing damages became material. In reaching his conclusion, the court made the following observation:

> "The determination of the persons entitled to compensation out of the award must be made as of November 16, 1942, the date of the filing of the declaration of taking, 'For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or a later date, receives payment'." (Citing *Danforth v. U. S., supra.*)

As is stated in the opinion in the *Milwaukee case*, the Government in a condemnation proceeding is privileged to abandon a projected condemnation at any time prior to the filing of a declaration of taking. This pronouncement finds support in the opinion of the Supreme Court of the United States in *Danforth v. United States, supra*, wherein it is said:

> "Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor, and thus gives to the use of the sovereign power of

> eminent domain an opportunity to determine whether the valuations leave the cost of a completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. 'The owner is protected by the rule that title does not pass until compensation has been ascertained and paid'."

Accordingly, it appears that in a condemnation proceeding, the action of the Government in filing petition and making entry upon the land in advance of the declaration of taking is purely contingent and inconclusive in character. Until the declaration of taking is filed the use of the land by the Government is purely permissive by virtue of the provisions of the *Second War Powers Act*, and in the meantime the Government acquires no title or vested interest whatsoever in the property.

Manifestly it would be unfair and unjust to allow the Government to fix the value of condemned property as of the time it makes entry thereon, when the Government is allowed the privilege of abandoning the property and rejecting title at any time prior to filing of declaration of taking. This statute prescribes no time within which a declaration of taking must be filed. In this case, the declaration of taking was filed nearly eight months after the original petition in condemnation was filed and order of immediate possession was entered thereon. In the interim the Government merely held a statutory option to take the land, which it could abandon at any time. Therefore, under such circumstances it is nothing but fair and

just that the land owners should be compensated on the basis of what their property was worth at the time the Government finally elected to condemn and take the same.

There is one other factor sustaining our position with respect to the question at hand that we believe is worthy of brief consideration. In this connection, we again refer to that portion of Section 258a which provides that "upon the filing of said declaration of taking and of the deposit in court * * * the right to just compensation for the same (real estate) shall vest in the persons entitled thereto." Thus the statute stipulates that the landowner's *right* to compensation for his property shall not vest until the declaration is filed. In other words, unless and until there has been duly made a declaration of taking in accordance with the statute, the landowner can assert no claim for the value of his lands.

Under such conditions it will be unconscionable to compel the land owner to accept a valuation of his premises as of a time far removed from the date when his right to compensation accrues. Certainly, the land owner should not be required to accept the value of his land determined as of a date before the Government should exercise its election to take it.

In the case at bar the Circuit Court of Appeals categorically disposed of the issue now under consideration with the statement in the majority opinion that "where, as here, the declaration of taking is filed on a date subse-

quent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired"; citing United States v. Lynah, 188 U. S. 445; Seaboard Air Line Railroad Company v. United States, 261 U. S. 299; United States v. Rogers, 255 U. S. 163; Olson v. United States, 292 U. S. 246, and United States v. 6.87 Acres of Land, 147 Fed. (2d) 351. (R. 141.)

With all deference and respect it is submitted that the issue here under discussion was neither raised nor remotely suggested in either of the above cases which were cited by the Circuit Court of Appeals in support of its conclusion. At most it may be said that such decisions reaffirmed the well established rule that property condemned should be valued as of the date of taking. However, none of said decisions undertook to construe the provisions of the Declaration of Taking Act with respect to the "date of taking." In fact, the Declaration of Taking Act had not become effective when any of the proceedings involved in the aforesaid cited decisions by the Supreme Court were undertaken. Therefore, it is believed that said cases are in no sense authority contra to our position in this matter, i.e., that inasmuch as the terms of the Declaration of Taking Act declares the date of taking to be the date the declaration of taking is filed, such statutory definition is conclusive for valuing property in all instances where the provisions of the statute are invoked.

POINT B.

The land involved herein having been condemned by the Government for a term of years extendable indefinitely at its option, the compensation awarded the land owners should not be limited to the annual rental value of the surface only, but same should also comprehend the depreciation in market value of the land and the oil and gas rights therein resulting from the exclusive taking by the Government.

Both the trial court and the Circuit Court of Appeals limited the recovery of the land owners in this cause to the rental value of the use of the surface of the land only, calculated on an annual basis. No consideration was given, nor compensation allowed, for damages which accrued to the fee owners by virtue of the oil, gas and mineral rights which they owned, and which in this instance were of far greater value than the surface rights.

According to the well settled rule of property in Texas oil and gas in place constitute a part of the land itself and possess all of the legal aspects of real property. *Texas Company v. Daugherty*, 107 Tex. 226, 176 S. W. 717; *Stephens County v. Mid-Kansas Oil & Gas Company*, 113 Tex. 160, 254 S. W. 290; *Humphreys-Mexia Company v. Gammon*, 113 Tex. 247, 254 S. W. 296. It is also well recognized in Texas jurisprudence that the interest in the oil, gas and minerals which is customarily reserved to the lessor in oil and gas leases in Texas, though commonly denominated "royalty", is in fact real property and possesses all of the legal aspects of such. *Sheffield v. Hogg*, 124 Tex. 290, 77 S. W. (2d) 1021; *Hager v. Stakes*, 116 Tex. 453, 294 S. W.

835; *W. T. Waggoner Estate v. Wichita County* (United States Circuit Court of Appeals, Fifth Circuit), 3 Fed. (2d) 962.

According to the prevailing and uniform practice in Texas the interest in the oil and gas in and under the land in question which was reserved to the lessors by the terms of the subsisting lease was an undivided one-eighth interest thereof. (R. 105-112.) Such interest is commonly the subject of barter and sale and possesses a definite market value. Such is true even though no production whatever may have been had previously. This conclusion is expressly recognized and confirmed by the United States Circuit Court of Appeals for the Fifth Circuit in considering the value of unproven oil and gas leases in *Eagle Lake Improvement Company v. United States*, 141 Fed. (2d) 562, wherein the court made the following comment:

> "In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estate of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful developments are too speculative and remote to be 'reasonably probable'."

Each of the courts below gave indication that the only value that the oil and gas rights which the land owners

possessed in the land in question, in advance of actual production, was expressed in the terms of the provisions in the lease providing that the lessee should pay to the lessors the sum of One Dollar per acre per year in lieu of the prosecution of development operations. Such payments are sometimes incorrectly denominated "delay rentals" but they are in no sense "rentals" within the conception of that term as used in the relation of landlord and tenant. Such "delay rentals" are simply the consideration which the lessee is obligated to pay to the lessor annually for the privilege of deferring lessee's development undertakings in the lease. Under no construction can it be said that the same is the consideration paid by the lessee to the lessor for the privilege of exploiting the oil and gas rights in the land. The meaning of the term "delay rentals" is explained in *Thuss on Texas Oil and Gas*, Second Edition, Sec. 29, Page 108, as follows:

> "These terms (delay rentals) have little in common with the conceptions of the term 'rent' as used in landlord and tenant, since most leases have the effect of conveying the oil and gas in place. Delay rentals exist only to prevent the termination of an estate or right, where the lessee has failed to commence drilling operations. Their office is to delay the commencement of a well without the loss of any right or estate which the lessee has immediately after the execution and delivery of the instrument."

It is true that in the instant case the taking by the Government did not deprive the land owners of the so-called "delay rentals" provided in the lease, because the

record discloses that the lessee continued to pay the same without interruption. (R. 101.) However, by far the most valuable estate which the fee owners possessed was materially affected by the taking, i.e., the one-eighth oil, gas and mineral estate which was reserved to them under the lease.

The exclusive use and occupancy of the land by the Government naturally affected the fee owners' rights to enjoy the benefits and privileges incident to the ownership of such one-eighth reserved interest, in like manner, as the Circuit Court of Appeals herein found and held that such possession affected the rights of ownership of the lessee's seven-eighths interest therein. (R. 138.) By the same reasoning that the Circuit Court of Appeals rejected "the fallacy of the 'fair annual rental' theory" as to the lessee, likewise it should have repudiated the same theory as to the lessors. The Circuit Court of Appeals correctly held, in the case at bar, we think, that the lessee was entitled to recover damages as a consequence of the condemnation measured by the difference in the market value of the leasehold immediately before and immediately after the taking. (R. 139.) We are unable to conceive why a similar conclusion was not reached concerning the oil, gas and mineral estate reserved by the lessors. Each owned an undivided interest in the same estate, and the value of each interest was diminished by the taking.

It may be conceded that because the estate of the lessee was limited to a term of years, lessee's damages were greater than those of the lessors, whose ownership was absolute. Nevertheless, such distinction relates only to a mat-

ter of evidence and does not involve a matter of right. The conclusion is inevitable that by virtue of the taking the land owners suffered a tangible loss in the value of their mineral estate, which was the subject of definite proof. Whether thereby they may have been deprived of an advantageous sale of their reserved estate, or a part thereof, is of no consequence here. Whether such loss in value may be recouped in later years is also immaterial. The controlling factor is the loss in actual value of the lessor's estate which was occasioned by and at the time of the taking.

The word "taken" as used in the Fifth Amendment in relation to compensation recoverable thereunder certainly has a broader meaning than merely the actual physical property itself. The opinion of the Supreme Court rendered during the past year in *United States v. General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 379, 156 A. L. R. 390, is respectfully referred to in support of this proposition. Clarifying the meaning, import, and effect of the language used in the Fifth Amendment providing that private property shall not be taken for public use without just compensation, Justice Roberts, who wrote the opinion in the case above cited, makes the following pertinent observations:

> "The critical terms are 'property'; 'taken' and 'just compensaton'. It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the

physical thing, as the right to possess, use and dispose of it. *In point of fact, the construction given the phrase has been the latter.* (Emphasis ours.) When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the short-hand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years', as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. *The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.* (Emphasis ours.) Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

In cases where the absolute fee simple title to property is condemned in perpetuity, the method of measuring the award is relatively simple. The prescribed rule in such

cases is announced by the Supreme Court in *United States v. Miller*, 317 U. S. 369, 87 L. Ed. 336. The distinction between such instances and those as in the present case is clearly drawn in the opinion in *United States v. General Motors Corporation, supra*, as follows:

> "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceedings chops it into bits, of which it takes only what it wants, however, few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates."

The rule of law permitting the recovery in condemnation cases of compensation for depreciation in value of property taken for a temporary period is also recognized and reaffirmed in the opinion of this Honorable Court in the *General Motors case*, hereinbefore referred to. The specific question there concerned the allowance of damages for fixtures and equipment which were destroyed or depreciated in value as a result of the condemnation of a leasehold interest. On this point Justice Roberts made the following observation:

> "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his right in land and the structures thereon erected. And it matters not whether they were

taken over by the Government or destroyed, since as has been said, destruction is tantamount to taking. This is true, whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade fixtures. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such."

It may be argued that inasmuch as it has not been established that the land in question is in fact oil bearing then no damage resulted from the abridgement or suspension of the right to explore and develop. It may be further contended that if in fact such land is underlain with oil and gas, same has not been appropriated by the Government and the owners will be privileged to develop and produce the same at the termination of the Government's occupancy. We submit that such argument does not prescribe the right criteria. Irrespective of whether or not the land shall ever yield up a drop of oil or a cubic foot of gas, the fact remains that the oil and gas rights therein possessed a definite market value, as a consequence of the oil development in the immediate vicinity, at the time of its appropriation by the Government, and as a result of the exclusive character of such appropriation, such market value was seriously impaired, if not totally destroyed.

Finally, it may be insisted that the damages sought in depreciated oil and gas value in the property taken are too speculative and uncertain to be the subject of an award in a condemnation proceeding. Such a contention should not appeal to a court whose duty it is to protect the rights of the citizen. It cannot be denied that the petitioners owned very definite and tangible property rights in the land the Government took over and occupied to the exclusion of all others and that by virtue of such taking and occupancy such rights were greatly depreciated. The extent of such depreciation in value was the subject of definite proof, and experts in oil values were tendered to testify regarding such depreciation. Such evidence would have been specific and the dimunition in value would have been expressed in dollars and cents.

If there should be any uncertainty regarding the amount of compensation to which the fee owners are entitled, let it be remembered that it is the Government which instigated the condemnation and determined the nature thereof, the extent of the estate or interest taken, and the length of the tenure. Consequently, it would seem to be but just and fair that any uncertainty as to the amount of compensation should not operate to the disadvantage of the petitioners who were in no sense the actors in the proceeding. Furthermore, it is well recognized that mere difficulty in arriving at the exact amount of damages recoverable con-

stitutes no legal obstacle for denying compensation, when the right to same is shown to exist.

As is said by this Honorable Court in *Eastman Kodak Co. v. Southern Photo Company*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684:

> "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate."

POINT C.

The damages sustained by the owner of the oil and gas lease affecting the land condemned should be ascertained and awarded fully and finally in one proceeding and judgment and not in deferred installments pursuant to a series of separate hearings and orders based on each year's occupancy of the land by the Government.

The Circuit Court of Appeals in its decision herein upheld the contention of the petitioners to the extent that it adjudged that the lease owner, the General Crude Oil Company, was entitled to recover compensation for depreciation in the market value of its leasehold estate caused by the condemnation. In virtue of such holding the judgment of the District Court was reversed. (R. 140-141.) However, in so doing the Circuit Court expressed the opinion that such damages should be appraised and assessed on a year-to-year basis throughout the term the Government might elect to retain possession of the land. A formula was prescribed for the trial court to follow in ascertaining damages sustained on such an installment basis. Pursuant to such formula it was directed that a separate hearing or trial be held to adjudicate the amount of damages which the lease owner had sustained for each year the Government continued to retain the premises, and it was ordered that the trial court retain jurisdiction of the case indefinitely for such purpose.

Insofar as the Circuit Court of Appeals decided that the compensation due the lease owner should be fixed on a piecemeal basis, instead of fully and finally in one proceeding, the petitioner, General Crude Oil Company, submits that

the holding of the Circuit Court of Appeals on the question of the award of damages is erroneous. We have been unable to find any statutory authorization either in Federal law or in the Texas statutes relating to condemnation proceedings which authorize such a procedure as has been prescribed by the Circuit Court of Appeals in this connection.

The *Declaration of Taking Statute* expressly recites that upon the filing of the declaration of taking and the deposit in court of the amount of the estimated compensation, title to the lands condemned shall vest in the United States and said lands shall be deemed to be condemned and taken for the use of the United States and the right to just compensation for same shall vest in the persons entitled thereto. Immediately thereafter said statute further expressly recites that "said compensation shall be ascertained and awarded in said proceeding and established by judgment therein." The correct inference, we submit, to be drawn from the foregoing statutory stipulation is whatever compensation the condemnee may be entitled to receive shall be ascertained and awarded in one proceeding and established by a judgment accordingly.

Let us examine again the character and extent of the estate that was condemned in the instant case. According to the pleadings, the declaration of taking, and judgment, the estate taken was "an estate for a term of years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States." (R. 35, 58, 64.)

Analyzing the aforesaid declaration it appears that the property condemned was "an estate for a term of years," which was not necessarily confined to the fifteen-months period between April 1, 1943 and June 30, 1944, but which comprehended an indefinite period thereafter "during the existing national emergency." Consequently, it follows that by virtue of the aforesaid specification the owners of the property condemned and all holding rights thereunder, as well as all those who might deal therewith, were put upon notice that the United States had condemned the property in question for a period commencing April 1, 1943, and extending throughout the existing national emergency, if the Government should choose to retain it for such period.

To be sure no one could then predict the duration of the "existing national emergency" nor definitely anticipate the action of the Government respecting its option to continue possession. Nevertheless, such factors do not negative the conclusion that the extent of the damages occasioned the oil and gas leasehold by the taking was subject to appraisal in one lump sum. The method by which the lease owner attempted to prove the extent of its entire damage is simple, comprehensive and fair, i.e., proof of the market value of the leasehold estate immediately before the taking and proof of its market value immediately after the taking, burdened with an estate for years extendable at the Government's election during the national emergency. The difference between such values represents the damages to the leasehold.

It may be true that the value of the reversionary interest of the lease owner, subject to the contingency stipu-

lated by the Government, might not be precisely ascertained. Nevertheless, the fact remains that such reversionary interest did possess a market value according to the witnesses tendered by the petitioners, and this they attempted to prove.

We have been unable to find a decision by any United States appellate court, other than the case at bar, in which the question now under consideration has been decided. However, it does appear that in several recent opinions rendered by district judges the issue has been rather extensively discussed. In at least three of such opinions the position which we take here has been upheld, to-wit, *United States v. 9.94 Acres of Land in the City of Charleston*, 51 Fed. Sup., 478 (Eastern District of South Carolina); *United States v. 60,000 Square Feet of Land Known as Oakland Hotel*, 53 Fed. Sup. 764 (Northern District of California); and *United States v. Bauman*, 56 Fed. Sup. 109 (District of Oregon). We commend the reasoning, logic and fairness of the conclusions of the judges who wrote the opinions in said cases. Particularly do we take the liberty to refer to the following statement found in the opinion of Judge Goodman in the *Oakland case*:

> "It is clear to me, that it was intended by the Fifth Amendment, and the pertinent statutes enacted to effectuate it, that 'just compensation' does not mean compensation awarded sometime or somewhere. The Government, of course, could have taken the full fee to the property, in which event the factual question of evaluation could be settled according to well-established rules. United States v. Miller, 317 U. S. 369,

63 S. Ct. 276. It elected, however, to take a leasehold term for a military hospital for an indefinite period.

* * * * *

"But by taking this special or particular type or interest in defendant's hotel property, the Government cannot defer payment for the damage, or interest taken, to a later period. Nor can it force defendant, if it chooses, to again litigate its right to compensation in another forum.

"Compensation should be determined by the jury in this proceeding. It has been frequently held that the compensation for the taking of property must be awarded in the condemnation proceeding itself. In East Bay Municipal Utility District v. Lodi, 120 Cal. App. 740, at page 762, 8 P. (2d) 532, at page 541, the court said: 'The law seems to be quite uniform that in eminent domain proceedings the damages must be assessed once and for all, and must include all the damages that might be inflicted by the condemning party.' Id. Sternes v. Sutter Butte Canal Co., 61 Cal. App. 737 216 P. 66."

The manifest wrongs and injustices that will be occasioned the condemnee if the holding of the Circuit Court in this particular be approved, are tremendous. The prospect that a lease holder or a land owner shall be compelled to undergo the expense and the ordeal of a hearing before commissioners and a court trial each year during the Government's indefinite tenure of the land is staggering to one's conception of the administration of justice. Such is contrary to all legal principles which abhor mutiplicity

of action and undertake to promote finality of legal procedure. The undue and unwarranted hardship that would inevitably result from the adoption of such procedure as prescribed by the Circuit Court for awarding damages in this cause could only serve to thwart the ends of justice.

WHEREFORE, petitioners respectfully submit that Writ of Certiorari should be issued as prayed for in Petition for Certiorari filed by the petitioners herein, and that upon hearing and consideration the decision of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed in the particulars and respects herein set forth, and that your petitioners have such other and further relief as to this Honorable Court may seem just and proper. And your petitioners will ever pray.

Respectfully submitted,

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